The Supreme Court of South Carolina

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who were administratively suspended from the practice of law on June 1, 2005, as required by order of the Supreme Court dated February 22, 2005. Pursuant to the February 22, 2005, order, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date of this order, the

lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 12, 2005

Lauren M Gersch
5850 Southcenter Blvd., D-103
Seattle, WA 98188

Lizabeth W. Littlejohn
430 Glenolden Dr.
Landrum, SC 29356-9391

Robert D. Purcell Jr.
1260 Palmetto Peninsula Dr.
Mt. Pleasant, SC 29464

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32

August 15, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Strategic Resources Company, Gerald D. Peterson, Continental Assurance Company, Continental Casualty Company, and CNA Group Life Insurance Company, Respondents,

v.

BCS Life Insurance Company, BCS Insurance Company, and American Arbitration Association, Inc., Defendants,

of whom BCS Life Insurance Company and BCS Insurance Company are Appellants.

Appeal from Fairfield County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26022
Heard April 20, 2005 - Filed August 15, 2005

REVERSED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, both of Richardson, Plowden, Carpenter & Robinson, of Columbia; D. Clay Robinson, of Robinson, McFadden & Moore, of Columbia; Mark E. Wilson, of Kerns, Pitrof, Frost & Pearlman, of Chicago, for Appellants.

C. Mitchell Brown and Kevin A. Hall, both of Nelson, Mullins, Riley & Scarborough, of Columbia; Gray T. Culbreath and Eric Fosmire, both of Collins & Lacy, of Columbia; J. Edward Bradley, of Moore, Taylor & Thomas, of West Columbia; Michael L. McCluggage, R. John Street, and Michael A. Kaeding, all of Wildman, Harrold, Allen & Dixon, of Chicago, for Respondents.

ACTING CHIEF JUSTICE MOORE: This case involves a dispute over how the American Arbitration Association (AAA) administered the selection of an arbitrator.

FACTUAL/PROCEDURAL BACKGROUND

BCS Life Insurance Company and BCS Insurance Company (Appellants) brought a lawsuit in an Illinois state court against Strategic Resources, Gerald D. Peterson, Continental Assurance Company, Continental Casualty Company, and CNA Group Life Insurance Company (Respondents) after a business deal went awry. The Illinois court compelled the parties to arbitrate pursuant to the parties' prior written agreement.

The agreement provided that any dispute would be submitted to a panel of three arbitrators, two to be selected by the parties (party arbitrators) and a third (neutral arbitrator) to be selected by the party arbitrators. The party arbitrators were selected but were unable to agree on who would serve as the neutral arbitrator. Appellants then declared that the party arbitrators had reached an impasse and sought assistance from the AAA to make the selection. [1]

[1] The trial court found that Appellants unilaterally made this request in an attempt to obtain an unfair advantage by having the neutral arbitrator selected from a favorable list of arbitrators.

Once Respondents became aware that Appellants sought the AAA's assistance, a disagreement ensued as to which set of AAA rules was applicable. Appellants argued that the AAA's Supplementary Rules for the Resolution of Intra-Industry United States Reinsurance and Insurance Disputes (Supplementary Rules) applied. But Respondents contended that the AAA's Commercial Rules applied.[2] After receiving Respondents' objections, the AAA issued a list of proposed arbitrators according to the Supplementary Rules and required the parties to "strike and rank" those candidates listed by July 18, 2003.

Respondents continued to object to the list provided by the AAA, and the parties were unable to compromise. On July 17, 2003, one day before the "strike and rank" deadline, Respondents initiated these proceedings.

The trial court found that the Appellants had engaged in a variety of wrongful conduct, including, but not limited to, manipulating the AAA, violating the rules of the AAA, improperly communicating with the AAA, and making inconsistent statements to the trial court at hearings and in documents filed with the court. As a result, the trial court enjoined the AAA from following the Supplementary Rules and directed the AAA to devise a list of arbitrators according to the Commercial Rules. Appellants appealed. This case was certified from the court of appeals pursuant to Rule 204(b), SCACR.

The following issue has been presented for review:

I. Did the trial court err in enjoining the AAA?

[2] We assume that the parties wanted the most favorable list of arbitrators. The Supplementary Rules, which generally apply to disputes involving insurance claims and coverage, would yield a list of arbitrators who are not lawyers, and who have significant experience as officers of life or health insurance companies. On the other hand, the Commercial Rules would yield a list of arbitrators who are lawyers, and who are experienced in complex contract disputes.

Standard of Review

An order granting or denying an injunction is reviewed for abuse of discretion. *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. *Id*.

An action seeking an injunction is in equity. *Doe v. South Carolina Med. Malpractice Liability Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001). Therefore, an appellate court can find facts in accordance with its own view of the preponderance of the evidence. *Id*.

I. Injunction

Appellants argue that the trial court erred in enjoining the AAA. We agree.

The trial court erred in granting the injunction for two reasons. First, the AAA is immune from this action under the doctrine of arbitral immunity. Second, the injunction was improper because Respondents had an adequate remedy at law.

A. Doctrine of Arbitral Immunity

"Individuals cannot be expected to [serve as arbitrators] if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit." *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982). Arbitral immunity insures that an arbitrator benefits from the independence necessary to protect him from bias or intimidation arising out of the exercise of judicial functions. *Butz v. Economou*, 438 U.S. 478, 508-511 (1978). As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision maker from undue influence. *Statz v. Schwab*, 175 Cal. Rptr. 3d 116, 125; *see also Brandon v. Medpartners*, 203 F.R.D. 677, 688 (S.D. Fla. 2001) (holding that "[j]ust as it would interfere

unduly with the legal system to permit suits against empanelled jurors, a suit against a chosen arbitration panel threatens to scuttle the efficacy of arbitration").

Many courts have extended arbitral immunity to organizations that sponsor or administer arbitrations, such as the AAA. *Am. Arbitration Ass'n v. Superior Court*, 10 Cal. Rptr. 2d 899, 900 (Ct. App. 1992) (citing *Baar v. Tigerman*, 211 Cal. Rptr. 426, 430-431 (Ct. App. 1983), which held a grant of immunity to an individual arbitrator is illusory unless the same immunity shields the sponsoring association); *New England Cleaning v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (Mass. 1999) (holding that arbitration associations also benefit from arbitral immunity insofar as the tasks they perform are integrally related to the arbitration); *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 971 (N.D. Cal. 1992) (holding arbitral immunity extends to arbitration associations).

In addition, federal law provides that "arbitral immunity protects all acts within the scope of the arbitral process." *Olson v. Nat'l Ass'n of Security Dealers*, 85 F.3d 381, 383 (8th Cir. 1996). However, arbitral immunity is not absolute immunity because it arises from the doctrine of judicial immunity, which is a limited immunity. *Cort*, 795 F. Supp. at 971.

The United States Supreme Court has held that judicial immunity does not apply when (1) the judge is engaged in nonjudicial actions, and (2) when the judge's actions are conducted in the absence of any jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Other courts have limited arbitral immunity to acts arising out of the scope of the arbitrator's function delegated by the parties through an initial agreement to arbitrate. *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977); *E. C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 551 F.2d 1026, 1032-33 (5th Cir. 1977); *Lundgren v. Freeman*, 307 F.2d 104, 117-118 (9th Cir. 1962); *Cahn v. Int'l Ladies' Garment Union*, 331 F.2d 113 (3d Cir. 1962).

The question before us is whether the AAA's decision to select a list of potential arbitrators from the Supplementary Rules falls within the scope of the arbitral process and not within one of the exceptions of judicial immunity.

Given the persuasive authority from federal courts and other jurisdictions, we find it necessary that arbitrators be afforded limited immunity from lawsuits related to decisions arbitrators make during the course of arbitration. In this case, the AAA's decision to select a list of potential arbitrators from the Supplementary Rules was within the scope of the arbitral process. Therefore, the AAA is immune from suit under these circumstances.

In addition, neither of the *Mireles* exceptions applies. First, the AAA's decision to select a list of potential neutral arbitrators was a quasi-judicial action. Second, the parties do not dispute that their arbitration agreement gave the AAA the authority or jurisdiction to administer the selection of the neutral arbitrator upon an impasse.

Respondents cite two cases in support of their argument that the trial court did not err in enjoining the AAA. However, we find these cases distinguishable from the present case.

In the first case, the Fifth Circuit held:

> the arbitrator has a duty, express or implied, to make reasonably expeditious decisions. Where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decision making (good or bad), he loses his claim to immunity because he loses his resemblance to a judge.

E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 551 F.2d 1026, 1033 (5th Cir. 1977). In *Ernst*, the plaintiff hired a contractor to build and renovate a hospital. Before construction began, plaintiff and contractor agreed that the architect who designed the renovations would arbitrate any dispute that would arise during construction. A dispute arose, and after more than a year, the architect had failed to respond to either party's attempts to arbitrate the matter. The court held that this delay was outside the scope of the arbitral process, and therefore the architect was not immune from the plaintiff's lawsuit. *Id.* at 1033-1034.

In a second case relied on by Respondents, the California Court of Appeals held that arbitral immunity is limited to those acts within an arbitration association's quasi-judicial role. *Baar v. Tigerman*, 211 Cal. Rptr. 426, 428 (Ct. App. 1983).[3] In *Baar*, a party in arbitration brought an action against the arbitrator for taking too long to resolve a dispute. As in *Ernst*, the court held that the arbitrator's failure to decide the dispute in an expeditious manner was outside the scope of his quasi-judicial capacity, and therefore the doctrine of arbitral immunity did not apply. *Id.* at 431.

We find that the present case is distinguishable from *Ernst* and *Baar*. Here, there is no allegation that the AAA caused any delay in arbitration. In addition, as stated earlier, AAA's decision to use the Supplementary Rules instead of the Commercial Rules was within the AAA's quasi-judicial capacity. Further, the relief sought in *Ernst* and *Baar* was in law (money damages) not for the equitable relief of an injunction which requires a showing of extraordinary circumstances.

Finally, sound public policy provides that an arbitrator not be forced to defend a claim and, in turn, be forced to step out of an impartial administrative role to assume an adversarial position. The AAA's decision to provide a list of potential arbitrators based on the Supplementary Rules falls within the scope of the arbitral process, and therefore the AAA is immune from lawsuits concerning this decision. Therefore, we hold that the trial court erred in enjoining the AAA.

B. Adequate Remedy at Law

Appellants argue, in the alternative, that the trial court erred in granting injunctive relief because Respondents had an adequate remedy at law. We agree.

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[3] The California Court of Appeals later disagreed with the holding in *Baar*. *See Statz v. Schwab*, 175 Cal. Rptr. 116, 125 (Ct. App. 2004) (foreseeing that such suits would cause arbitrators to make decisions based upon their fear of suits rather than on the merits).

The power of the court to grant an injunction is in equity. *Doe v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.E.2d 670, 671 (2001). The court will reserve its equitable powers for situations when there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *Calcutt v. Calcutt*, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct. App. 1984).

An injunction is appropriate when the party seeking the injunction (1) would suffer irreparable harm if the injunction is not granted; (2) will likely succeed in the litigation; and (3) has no adequate remedy at law. *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

Injunctions are "drastic" remedies and should be "cautiously applied." *LeFurgy v. Long Cove Club Owners Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994). In deciding whether to grant an injunction, the court must "balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damage [which seems] most consistent with justice and equity under the circumstances of the case." *Forest Land Co. v. Black*, 216 S.C. 255, 266-267, 57 S.E.2d 420, 426 (1950).

In the present case, the trial court ruled that Respondents "should not be required to wait until the arbitration has concluded before challenging the proceedings," because it would be "wasteful" to arbitrate "pursuant to inapplicable rules and with an improperly selected neutral arbitrator."

Respondents, however, were not entitled to an injunction because an adequate remedy at law existed. Rather than seek an injunction, Respondents

had the right to appeal.[4] The right to appeal protects Respondents' rights and gives them an opportunity to repair any prejudice caused by the alleged improper selection of the neutral arbitrator. Accordingly, we hold that the trial court erred in granting the injunction.

CONCLUSION

We reverse the lower court and hold that, based on the doctrine of arbitral immunity, the AAA is immune from the injunction. We further hold that an injunction was an improper remedy because Respondents had the right to appeal the result reached in arbitration. Therefore, the trial court's ruling is

REVERSED.

WALLER, BURNETT, JJ., and Acting Justice J. Cordell Maddox, Jr., concur. PLEICONES, J. concurs in result only.

[4] *See* 9 U.S.C. §§ 10, 11, and 12 (sections of the Federal Arbitration Act, which provide that a party in arbitration has the right to appeal at the conclusion of arbitration).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Maria E. Robinson, Respondent,

v.

Ronald P. Robinson, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 26023
Submitted May 18, 2005 - Filed August 15, 2005

AFFIRMED

J. Mark Taylor, of Moore Taylor & Thomas, of West Columbia, for Petitioner.

C. Dixon Lee, III, of McLaren & Lee, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: We granted certiorari to review the court of appeals' decision to dismiss an appeal as untimely. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Ronald (Husband) and Maria (Wife) Robinson were granted a divorce on March 24, 2003. On April 2, 2003, the family court ordered Husband to pay Wife's attorney's fees, costs, and other expenses. The court found that $300 per hour was a "fair and reasonable" attorney's fee and calculated the award accordingly.

Husband filed a post-trial motion to alter or amend, contending, among other things, that the attorney's fee award was "excessive." After a hearing, the court affirmed its calculation of fees at a rate of $300 per hour. In the order, filed June 20, 2003, the court explained its ruling as follows:

> [t]he Court also finds it appropriate to address Defendant/Husband's argument that the attorney's fees awarded to Plaintiff/Wife should be calculated at a rate of $250.00 per hour rather than $300.00 per hour allowed by the Court. At one point, the Affidavit of Plaintiff/Wife's counsel refers to a rate of $250.00 per hour. This is a scrivener's error in that Affidavit. The . . . correct rate is $300.00 per hour for attorney time . . . .

On June 27, 2003, Husband filed a second post-trial motion to alter or amend, requesting that the court delete the above-quoted paragraph from the June 20 order. By order dated August 5, 2003, the court denied the motion, finding that the paragraph explained the basis for denying the first post-trial motion.

On August 19, 2003, Husband filed a notice of appeal. In response, Wife filed a motion to dismiss on the ground that the notice of appeal was not timely served. The court of appeals granted Wife's motion to dismiss. Husband petitioned for review, and the court of appeals affirmed.

This Court granted certiorari to review the following issue:

> Did the court of appeals err in dismissing Husband's appeal as untimely?

LAW/ANALYSIS

Husband contends that the filing of a second post-trial motion tolled the time period for filing a notice of appeal, and therefore the court of appeals erred in dismissing his appeal as untimely. We disagree.

The filing of successive post-trial motions raising issues already raised to and ruled upon by the trial court does not toll the time to serve a notice of appeal. *Quality Trailer Products, Inc. v. CSL Equip. Co., Inc.*, 349 S.C. 216, 219, 562 S.E.2d 615, 617 (2002). A second motion "is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion . . . ." *Coward Hund Constr. Co. v. IGT*, 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999). These general principles were recently affirmed in *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004).

In the present case, Husband filed two successive post-trial motions. In the first motion, Husband contended, among other things, that the award of attorney's fees was excessive. At the hearing on this motion, Husband apparently argued that attorney's fees should have been calculated at a rate of $250 per hour instead of $300 per hour.[1] The court rejected this argument and found that an affidavit submitted by Wife's attorney referring to a rate of $250 per hour constituted a scrivener's error, and therefore the rate of $300 per hour was correct. As a result, the court affirmed the award of fees in the original judgment.

In response to this ruling, Husband filed a second motion to alter or amend, this time requesting that the court delete the entire paragraph concerning attorney's fees and the scrivener's error. Husband did not state any grounds for this request. The court denied the motion.

First, Husband contends that the ruling on the first motion substantively altered the court's original judgment, and therefore the second motion tolled the period for filing a notice of appeal. We disagree. The court's ruling on

[1] The transcript from the hearing is not part of the record. But the court references this argument in both the June 20 and August 5 orders.

the first motion affirmed the award of attorney's fees at a rate of $300 per hour. Because the award of attorney's fees was affirmed, and nothing from the original judgment was altered, the second motion, asking the court to delete the paragraph concerning the issue of attorney's fees, was not appropriate. *See Coward Hund*, 336 S.C. at 3, 518 S.E.2d at 58 (holding that a second motion "is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion . . . ."). Therefore, the second post-trial motion did not toll the time for appeal.

Second, Husband contends that the second post-trial motion was based on different grounds than his first post-trial motion. We disagree. In the first motion, Husband asked the court to review the entire order on attorney's fees, arguing that the fees were excessive. In the second motion, Husband requested, without explanation, that the entire paragraph regarding fees be deleted from the June 20 order. We can only presume that this attempt to delete the court's ruling on attorney's fees was another attempt to raise the issue regarding attorney's fees. Therefore, because the second motion did not articulate *any* grounds—much less different grounds—we disagree with Husband's argument that the second motion was based on different grounds than the first motion. As a result, we find that the second motion did not toll the time to file an appeal. *See Quality Trailer*, 349 S.C. at 219, 562 S.E.2d at 617 (holding that the filing of successive post-trial motions raising issues already raised to and ruled upon by the trial court does not toll the time to serve a notice of appeal).

Finally, Husband contends that the second motion was necessary to preserve for review his challenge to the award of attorney's fees premised on a finding of a scrivener's error. But Husband did not raise the scrivener's error issue in his second motion. In fact, he did not raise any new issues. Therefore, the second motion was not necessary to preserve the issue for appeal.

Accordingly, we hold that the court of appeals properly dismissed Husband's appeal as untimely. On March 24, 2003, the divorce decree was filed. On April 2, a supplemental order requiring Husband to pay attorney's fees was filed. On April 17, Husband filed a post-trial motion to alter or amend. On June 20, the court denied the motion. On July 8, Husband filed a

second post-trial motion to alter or amend. On August 5, this motion was denied. Because we find that the second post-trial motion did not toll the time for appeal, Husband's notice of appeal—filed on August 19, approximately two months after the June 20 order—was untimely. *See* Rule 203(b)(1) and (2), SCACR (a notice of appeal in a case appealed from family court shall be served within thirty days after receipt of written notice of entry of the order or judgment). Therefore, the notice of appeal was properly dismissed.

CONCLUSION

Based on the reasoning above, we affirm the court of appeals' decision dismissing the notice of appeal as untimely.

AFFIRMED

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., dissents in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent because, in my opinion, Petitioner's notice of appeal was timely. I would therefore reverse the Court of Appeals' order dismissing the appeal and remand the matter to that court with instructions that the appeal go forward.

On March 24, 2003, the family court filed its "Final Decree of Divorce." While this order stated that Petitioner would be required to contribute to Respondent's attorney's fees and other experts' fees, the amounts to be paid were not specified. On April 3, 2003, the judge filed a supplemental order correcting his initial clerical error and awarding Respondent approximately $46,000 in fees. Petitioner filed a motion to alter or amend; following a hearing the family court judge filed an "Order Regarding Post Trial Motion" on June 20, 2003. In this order, the judge explained for the first time that he calculated Petitioner's attorney's fee rates at $300/per hour rather than the $250/per hour mentioned at one point in Petitioner's attorney's fee affidavit because the judge concluded that the reference to $250 was "a scrivener's error."

Following receipt of the June 20 order, Petitioner filed a second post-trial motion asking only that the judge delete from that order the paragraph finding that the reference to $250/per hour was a scrivener's error. On August 5, 2003, an order denying this request was filed. In this order, the family court judge noted that this paragraph had been included because Rule 26, SCFCR, required that he make a specific fact finding why he rejected Petitioner's contention that the proper figure was $250 rather than $300. Petitioner then served and filed his notice of appeal on August 20, 2003.

The Court of Appeals apparently dismissed Petitioner's appeal because it found that his second post-trial motion was impermissibly successive, and that therefore the thirty-day period to serve the notice of appeal commenced when Petitioner received the June 20 order denying his first post-trial motion. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)(when successive post-trial motions will toll the time to appeal). While the majority agrees with the Court of Appeals, I do not. A post-trial motion does not toll the time to appeal when it merely raises the same issues and arguments made in a prior post-trial motion. Elam, *supra.* In this case, however, Petitioner's

second post-trial motion asked only that the family court reconsider a finding made in its first post-trial order. Petitioner could not have raised this issue until he received that order, and had he not challenged it through a post-trial motion would have been bound by that finding on appeal. See Pelican Bldg. Centers v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) (issue not preserved for appeal where ruling made first in post-trial order and not challenged by a subsequent Rule 59 (e) motion). In my opinion, Petitioner's second post-trial motion tolled the time to appeal.

I would reverse the Court of Appeals' order and reinstate this appeal.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lyle Neely and Gloria Russell Ballard, as Personal Representatives of the Estate of Rita Russell, Petitioners,

v.

Nancy Thomasson, individually, and as Personal Representative of the Estate of John Thomas Neely, and Josephine Morgan Wells, of whom Nancy Thomasson, individually and as Personal Representative of the Estate of John Thomas Neely, is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
Howard P. King, Circuit Court Judge

Opinion No. 26024
Heard March 1, 2005 - Filed August 15, 2005

AFFIRMED IN PART; REVERSED IN PART

Carolyn W. Rogers, of Harper and Rogers, of Rock Hill, for Petitioners.

Lucy London McDow, of Rock Hill, for Respondent.

CHIEF JUSTICE TOAL: This case involves a probate matter. The probate court ruled that Nancy Thomasson (Nancy) was not the child of John Thomas Neely (Decedent) and therefore could not inherit from his estate. Nancy appealed and the circuit court affirmed. Nancy appealed once again, and the court of appeals held that (1) the probate court did not have subject matter jurisdiction to determine paternity, and (2) the divorce decree between Decedent and Josephine Morgan Wells (Mother) constituted a prior, final adjudication of paternity. *Neely v. Thomasson*, 355 S.C. 521, 586 S.E.2d 141 (Ct. App. 2003). We granted certiorari to review the court of appeals' decision. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

John Thomas Neely (Decedent) and Josephine Morgan (Mother) married on July 22, 1944. Approximately seven months before the couple married, Mother gave birth to a baby girl, Nancy. The birth certificate listed Decedent as the father, and the child was given Decedent's last name.

Two-and-a-half years after marrying, the couple separated. The separation agreement states that the couple has "one child, Nancy Jane Neely, a girl," and that Decedent "shall have the right and privilege to see and visit with his infant daughter at any reasonable time or place." The agreement also released Decedent of all obligations to support Mother or Nancy.

Thereafter, the couple lived apart, but did not obtain a divorce until approximately seventeen years later, when Mother filed for divorce on the ground of desertion. In the complaint, Mother alleged the following:

> That there was born to the union of this marriage one child, [Nancy], who is now married and no longer dependent on [Mother] for support.

Decedent never answered the complaint and was found in default.

The divorce matter was referred to a special referee who conducted a hearing in which Mother testified as follows:

> Q. When were you and [Decedent] married?
> A. July 22, 1944
> Q. Where were you married?
> A. York, South Carolina.
> Q. I believe there was one child born to this union, and that child is now grown and married?
> A. Yes, sir.

Based on this testimony, the special referee made the following finding:

> The evidence further showed that the parties to this action are the parents of one child, who is now grown and married, and that since this child is now married, there is no question of custody or support.

These findings were incorporated into the divorce decree. Decedent never contested these findings or appealed.

On July 21, 1998, Decedent died intestate and unmarried. At the hearing to appoint a personal representative, the probate court received two competing petitions for appointment: one from Decedent's siblings, and one from Nancy, alleging that she was Decedent's daughter. After considering the evidence presented, the probate court found that Nancy was Decedent's daughter and, accordingly, appointed her as personal representative of the estate.

Thereafter, Decedent's siblings petitioned the court for a determination of heirs, alleging that Nancy was not Decedent's daughter. Following the submission of DNA and blood-type evidence, the probate judge ruled that Nancy was not Decedent's child, and therefore not an heir. In addition, the judge found that the divorce proceeding between Decedent and Mother did

not constitute a prior adjudication of paternity. As a result, the judge ruled that Nancy was not Decedent's child for purposes of intestacy.

Nancy appealed and the circuit court affirmed. Nancy appealed once again, and the court of appeals vacated in part and reversed and remanded in part. The court of appeals held that the probate court did not have jurisdiction to determine paternity. In addition, the court held that the divorce decree represented a prior adjudication of paternity, and therefore, Nancy was the Decedent's child for purposes of intestacy proceedings. *Neely v. Thomasson*, 355 S.C. 521, 586 S.E.2d 141 (Ct. App. 2003).

This Court granted Decedent's siblings' petition for certiorari. The following issues have been raised for review:

I. Did the court of appeals err in finding that the probate court lacked subject matter jurisdiction to determine paternity?

II. Did the court of appeals err in finding that the divorce decree constituted a prior, final adjudication of paternity?

LAW/ANALYSIS

Standard of Review

When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them. *Matter of Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). Questions of law, however, may be decided with no particular deference to the lower court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

I. Subject Matter Jurisdiction

Decedent's siblings contend that the court of appeals erred in holding that the probate court lacked subject matter jurisdiction to determine paternity. We agree.

This issue involves two seemingly conflicting statues. The first statute, found in the Probate Code, provides as follows:

> (a) To the full extent permitted by the Constitution, and except as otherwise specifically provided hereinafter, *the court has exclusive original jurisdiction* over all subject matter related to:
>
> > (1) estates of decedents, including the contest of wills, construction of wills, and *determination of heirs* and successors of decedents and estates of protected persons . . . .

S.C. Code Ann. § 62-1-302 (1987) (emphases added). "Heirs" is defined as "those persons . . . who are entitled under the statute of intestate succession to the property of a decedent." S.C. Code Ann. § 62-1-201(17) (1987).

The second statute, found in the Children's Code and entitled "Jurisdiction of family court in domestic matters," provides as follows:

> The *family court* shall have *exclusive jurisdiction*: . . .
>
> > (7) *To hear and determine actions to determine the paternity of an individual.*

S.C. Code Ann. § 20-7-420(7) (1985) (emphases added).

The court of appeals recently held that because section 20-7-420(7) states that family courts have exclusive jurisdiction to hear and determine paternity, probate courts lack subject matter jurisdiction to make such determinations. *Simmons v. Bellamy*, 349 S.C. 473, 476, 562 S.E.2d 687, 689 (Ct. App. 2002). Applying the rule from *Simmons*, the court of appeals in the present case held that the probate court did not have jurisdiction to determine whether Nancy was Decedent's biological daughter. As in *Simmons*, the court found that under section 20-7-420(7), family courts have exclusive jurisdiction to determine paternity.

We disagree and hold that the court of appeals erred in finding that the probate court lacked subject matter jurisdiction to decide paternity for the purpose of determining heirs. The probate court has "exclusive original jurisdiction over all subject matter related to . . . [the] determination of heirs." S.C. Code Ann. § 62-1-302. A determination of heirs may require the probate court to determine consanguineous relationships, including paternity. Provisions throughout the Probate Code anticipate such determinations. *See, e.g.*, S.C. Code Ann. § 62-2-107 (1987) (providing that "[r]elatives of the half blood inherit the same share they would inherit if they were of whole blood . . . ."); S.C. Code Ann. § 62-1-201(21) (1987) (defining "issue" as "lineal descendants whether natural or adoptive"). Moreover, as a matter of judicial economy, the probate court should have the power to make decisions necessary to the administration of an estate. Therefore, we hold that probate courts have the authority to determine paternity for the purpose of determining heirs. *Cf. Brown v. Ryder Truck Rental*, 300 S.C. 530, 533, 389 S.E.2d 161, 163 (Ct. App. 1989) (holding that the Workers' Compensation Commission has subject matter jurisdiction to determine paternity for the purpose of determining dependency).[1]

Accordingly, the portion of the court of appeals' decision finding that probate courts lack jurisdiction to determine paternity is reversed. Moreover, the court of appeals' decision in *Simmons v. Bellamy*, 349 S.C. 473, 562 S.E.2d 687 (Ct. App. 2002), is overruled.

[1] We note that the General Assembly recently passed legislation giving family and probate courts concurrent jurisdiction to determine paternity. The Probate Code has been amended to read: "The court's jurisdiction to hear and determine paternity matters and validity of marriages of decedents is concurrent with that of the family court . . . ." S.C. Code Ann. § 62-1-302(c) (2005). And the Children's Code now reads: "The family court and the probate court of each county have concurrent jurisdiction to hear and determine matters concerning the validity of marriages of decedents and paternity of an individual." S.C. Code Ann. § 20-7-420(B) (2005). Our decision today, however, is based not on these amendments, but on the reasoning set forth in this opinion.

II. Paternity Adjudication

Decedent's siblings contend that the court of appeals erred in finding that the divorce decree constituted a prior, final adjudication of paternity. We disagree.

A person born out of wedlock may inherit from a father who dies intestate if it is determined, "in an adjudication commenced before the death of the father," that the person is the father's child. S.C. Code Ann. § 62-2-109(2) (1986). A family court proceeding in which child custody, support, and visitation rights are determined may constitute an adjudication of paternity. *Eichman v. Eichman*, 285 S.C. 378, 380, 329 S.E.2d 764, 766 (1985). Paternity may also be adjudicated in a divorce proceeding. *Beyer v. Metze*, 326 S.C. 356, 359, 482 S.E.2d 789, 791 (Ct. App. 1997).

If the issue of paternity was raised, or could have been raised, in a prior action, a party to that action is barred from challenging paternity at a later date. *Eichman*, 285 S.C. at 380, 329 S.E.2d at 766; *but cf. Palm v. Gen. Painting Co., Inc.*, 302 S.C. 372, 373, 396 S.E.2d 361, 361 (1990) (noting that a child is not bound by paternity determinations made in a prior divorce action). Heirs are barred from asserting claims that their ancestor would have been barred from asserting during his lifetime. *Watson v. Watson*, 172 S.C. 362, 370-71, 174 S.E. 33, 36 (1934); *cf. Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931) (explaining that heirs are generally in privity with their ancestor).

In *Eichman v. Eichman*, husband and wife were married several months after the birth of the child. 285 S.C. at 379, 329 S.E.2d at 765. A few years later, the couple separated, and husband filed an action in family court for a determination of custody, support, and visitation rights. The resulting order provided:

> I also find that a healthy child has been born of the marriage, namely [child's name], and that [husband] is a healthy and intelligent father and is capable of earning a sufficient income to support himself and the minor child of the parties . . . .

In addition, the order granted custody to mother, provided that husband would pay $200 per month in child support, and outlined husband's visitation rights. *Id.*

Later, the couple filed for divorce, and husband contended that he was not the child's father. Accordingly, he asked the family court to order the necessary paternity tests. The court denied husband's request, and this Court affirmed, stating "There can be no question but that these same parties were previously before the court relative to the same subject matter and that *an adjudication was made.*" *Id.* at 380, 329 S.E.2d at 766 (emphasis added). Accordingly, husband was barred from raising the paternity issue in a later action. *Id.*

Similarly, in *Beyer v. Metze*, the divorce decree stated that three children—two who had wife's last name and one who had husband's last name—were born during the marriage. 326 S.C. at 358, 482 S.E.2d at 790. Wife was granted custody and husband was ordered to pay support in the amount of $25 per week for each child, totaling $75 per week. Husband did not challenge or appeal the decree. Approximately thirteen years later, DSS filed a petition to collect support, totaling $48,675. *Id.* at 358, 482 S.E.2d at 791. Husband contended that two of the children were not his and asked the court to order blood tests. In response, DSS contended that paternity had been adjudicated during the divorce proceeding and therefore husband was estopped from challenging paternity in a later action.

The court of appeals agreed and held that "[t]he wording [in the decree], read in conjunction with the provisions allowing [husband] visitation of the children and requiring him to pay support for them, *clearly implies paternity*." *Id.* at 359, 482 S.E.2d at 791 (emphasis added). Accordingly, the court held that because paternity "had previously been determined in an order which was neither challenged nor appealed," the family court properly denied husband's request to order blood tests. *Id.*

In the present case, Decedent and Mother married several months after Nancy was born. On Nancy's birth certificate, Decedent is listed as the father, and Nancy was given his last name. When the couple separated, Decedent signed an agreement acknowledging that he was Nancy's father.

The agreement gave Decedent "the right and privilege to see and visit with his infant daughter at any reasonable time or place."

Several years later, when the couple divorced, the complaint alleged that "there was born to the union of this marriage one child." According to the affidavit and proof of service contained in the record, Decedent was personally served with the divorce complaint. After the time expired for Decedent to answer the complaint or otherwise plead, Wife's attorney filed an affidavit of default.

A hearing was conducted before a special referee. Decedent did not appear at the hearing. The special referee found that Decedent and Mother were "the parents of one child, who is now grown and married." The special referee also found that, because the child is married, "there is no question of custody or support." These findings were adopted by the circuit court judge who issued the final divorce decree. Decedent did not appeal.

Because the court found that one child was born during the marriage, and that Decedent was the parent of that child, we find that the issue of paternity was adjudicated in the divorce proceeding. The fact that the order did not outline specific provisions regarding custody and support, like the orders in *Eichman* and *Beyer*, does not undermine our finding. As the special referee explained, there was no need to outline such provisions because the child was grown and married. Moreover, Decedent and Mother had resolved custody and support issues in the separation agreement signed years ago. Therefore, we hold that the divorce proceedings constituted a prior adjudication of paternity.

Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. *See Eichman*, 285 S.C. at 380, 329 S.E.2d at 766. As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. *See Watson*, 172 S.C. at 370-71, 174 S.E. at 36. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime. In fact, there is no evidence in the record that Decedent took any steps whatsoever during his lifetime to disclaim Nancy as

his daughter. To the contrary, Decedent acknowledged, on more than one occasion, that Nancy was his child. Therefore, we hold that Decedent's siblings should not have been permitted to challenge the prior paternity determination.

Accordingly, the court of appeals' decision finding that the divorce decree constituted a prior, final adjudication of paternity is affirmed. As a result, Nancy is Decedent's child for purposes of intestacy proceedings.

CONCLUSION

We hold that the court of appeals erred in finding that the probate court lacked jurisdiction to determine paternity for the purpose of determining heirs. Nonetheless, because a prior adjudication of paternity had been made, the probate court erred in allowing Decedent's siblings to challenge paternity during the administration of the estate. For this reason, we affirm the court of appeals' decision finding that the divorce action constituted a prior, final adjudication of paternity. Therefore, the court of appeals' decision is affirmed in part and reversed in part.

AFFIRMED IN PART; REVERSED IN PART

MOORE, WALLER, and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andrew W. Bright, Jr., Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Lancaster County
Kenneth G. Goode, Post-Conviction Judge

Opinion No. 26025
Submitted March 16, 2005 - Filed August 15, 2005

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David A. Spencer, all of Columbia, for Petitioner.

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Andrew Bright (Respondent) was charged with three counts of kidnapping, three counts of pointing a firearm, and criminal sexual conduct in the third degree. After negotiating a plea agreement with the state, Respondent pled guilty to one count of kidnapping and three counts of pointing a firearm. Respondent was sentenced to eighteen years imprisonment for kidnapping and five years for each count of pointing a firearm, to be served concurrently with the kidnapping sentence. Respondent applied for post-conviction relief (PCR), and following a hearing, relief was granted on the basis that the plea was not freely and voluntarily given. This Court granted the State's petition for certiorari. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

The parties do not dispute the facts in this case. After moving from Florida to South Carolina, Respondent went to live with his half-sister and her husband. Eventually, Respondent moved across the street to live with his mother.

One day, while at his half-sister's house, Respondent and his half-sister got into an argument. At some point during the argument, Respondent left the house and went to his mother's house to get a shotgun and shotgun shells. When he returned to his half-sister's house, he pointed the shotgun at her, restrained her with a bathrobe belt, and made her get down on the floor. A couple of hours later, his half-sister's husband came home to find Respondent holding his half-sister at gunpoint. Respondent pointed the gun at the husband and told his half-sister to tie up her husband with an extension cord. Later, Respondent's mother arrived, and she, too, was tied up.

While the three were tied up, Respondent questioned them about family matters. Several hours later, satisfied that he had learned all of the information that he wanted, Respondent told his half-sister to call the police and she did. Respondent surrendered when the police arrived.

During the plea hearing, Respondent said, "[i]t's true that I did what I'm accused of doing, your honor. No one regrets it more than I do. I

hesitate to say exactly what prompted me to do all of it, and I was provoked in part by my family members." A plea agreement was reached, which provided that if Respondent pled guilty, he would be charged with only one count of kidnapping and three counts of pointing a firearm. Accordingly, Respondent pled guilty to one charge of kidnapping and three charges of pointing a firearm and was sentenced to eighteen years imprisonment for kidnapping and five years for each count of pointing a firearm, to be served concurrently with the kidnapping sentence.[1] Respondent applied for PCR, and following a hearing at which plea counsel did not appear, relief was granted on the basis that the plea was not freely and voluntarily given. This Court granted the State's petition for certiorari to review the following issue:

> Did the PCR court err in finding that counsel rendered ineffective assistance during the plea proceeding?

LAW/ANALYSIS

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

[1] Respondent did not receive the maximum sentence for these crimes. For example, he could have received thirty-years imprisonment – the maximum sentence – for one charge of kidnapping alone.

DISCUSSION

The state contends that the PCR judge erred in granting Respondent relief. We agree. To prove that counsel was ineffective when a guilty plea is challenged, petitioner must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered. *Griffin v. State*, 361 S.C. 173, 176-77, 604 S.E.2d 394, 396 (2004).

At the PCR hearing, Respondent testified that counsel (1) did not take enough time to meet with him; (2) did not inform Respondent about his right to a bail hearing, a bond hearing, or preliminary hearing; and (3) admitted Respondent's guilt without Respondent's consent. Based on this testimony, the PCR court made the following findings:

> (1) counsel did not adequately consider the grave nature of the indictments and failed to meet with and inform Respondent in a manner that would allow Respondent to make informed and voluntary decisions regarding his defense;
>
> (2) counsel waived Respondent's substantive and procedural rights without Respondent's knowledge or consent; and
>
> (3) Respondent's plea was not freely and voluntarily made because he was not adequately informed of his procedural rights and defenses, and was erroneously counseled to give affirmative responses to the trial judge during the plea.

As a result, the PCR court found that Respondent would not have pled guilty but for counsel's error.

We find no evidence to support the PCR court's findings. The record indicates that counsel met with Respondent on two separate occasions. Although Respondent's plea counsel did not appear at the PCR hearing, at the plea hearing, counsel stated, "I have taken some time, as I'm required to do, to go over with him the elements of the charges and how his actions would

have satisfied those elements, both on pointing and kidnapping." Counsel also explained that he talked "a lot" with Respondent about taking the stand and giving his version of the facts, which were identical to the state's version. In addition, at the plea hearing, Respondent said that he was satisfied with his counsel's services, did not have any problems with counsel's representation, and that he regretted his crimes. Accordingly, we find that counsel was not ineffective.

Moreover, we find that counsel's plea negotiations for Respondent proved advantageous. Counsel successfully negotiated a plea agreement in which two kidnapping and one criminal sexual conduct charge were dropped. Moreover, the solicitor agreed to ask for twenty-years imprisonment for the kidnapping charge, instead of the thirty years maximum statutory sentence. Finally, the solicitor asked that the sentences attaching to the pointing-a-firearm charges be served concurrent to the kidnapping charge. Therefore, counsel negotiated a favorable plea on Respondent's behalf.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's ruling and reinstate Respondent's convictions and sentence.

REVERSED

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gregg M. Cobb, Respondent,

v.

The South Carolina Department of Transportation, Petitioner.

Ernest R. Leopard, Respondent,

v.

The South Carolina Department of Transportation, Petitioner.

Louise S. Campbell and James Robert Campbell, Respondents,

v.

The South Carolina Department of Transportation, Petitioner.

Ruby D. Bowen, Respondent,

v.

The South Carolina Department of Transportation, Petitioner.

Robert P. Harling, Respondent,

v.

The South Carolina Department
of Transportation, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Pickens County
John C. Few, Circuit Court Judge
Larry R. Patterson, Circuit Court Judge

Opinion No. 26026
Heard June 16, 2005 - Filed August 15, 2005

AFFIRMED AS MODIFIED

Robert L. Widener, of McNair Law Firm, P.A., and Beacham O. Brooker, Jr., both of Columbia, for petitioner.

David B. Ward, of Horton, Drawdy, Ward & Jenkins, P.A., of Greenville, for respondents.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' order dismissing petitioner's appeal. We affirm as modified.

FACTS

Respondents (Landowners) commenced these actions for inverse condemnation claiming that closure of a public street in the City of Easley damaged their property. Petitioner South Carolina Department of Transportation (DOT) moved to transfer Landowners' cases to the non-jury docket. Judge Few ruled Landowners have a right to a jury trial in the compensation phase of trial; he left decisions regarding "bifurcation" to the trial judge. DOT's appeal of this order was dismissed.

ISSUE

Is the circuit court's order immediately appealable?

DISCUSSION

In denying DOT's motion to transfer Landowners' cases to the non-jury docket, Judge Few's order states:

> I find that the landowners do have a right to a jury trial in the compensation phase of this inverse condemnation case. Questions related to the mode of trial, such as whether to bifurcate the takings and compensation phases, are left for the trial judge.

(emphasis in original). The Court of Appeals found this order is not a final order and dismissed DOT's appeal.

The Court of Appeals construed Judge Few's order as leaving the "mode of trial" decision entirely to the trial judge's discretion. We do not read this order so narrowly. Judge Few clearly ruled that Landowners are entitled to jury trials in the compensation phase of each case. This ruling, which cannot be overturned by the judge who

eventually tries these cases,[1] leaves only procedural issues such as "bifurcation." In light of DOT's argument at the hearing before Judge Few, "bifurcation" refers to DOT's request that the taking and compensation issues be separated. DOT contended below, as it does here, that there should be a non-jury bifurcated proceeding allowing it to decide whether to pay compensation or "undo" the taking by restoring Landowners' property to its previous condition. Bifurcation in this context does not refer to the mode of trial issue involved in determining whether a case is tried in a jury or non-jury proceeding.

Reading Judge Few's order as allowing a jury trial in the compensation phase, we turn to the issue whether such an order is immediately appealable. If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000); Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993); *see also* Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978) (an order allowing a jury trial is immediately appealable where there is no such entitlement as a matter of right). DOT asserts there is no right to a jury trial in an inverse condemnation case and therefore Judge Few's order is immediately appealable.

Although there are several appellate decisions involving jury trials in inverse condemnation cases,[2] we have never addressed the

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[1] *See* Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (one circuit judge does not have power to reverse an order of another circuit judge regarding the proper mode of trial).

[2] *E.g.*, Cutchin v. South Carolina Dep't of Hwys. and Pub. Transp., 301 S.C. 35, 389 S.E.2d 646 (1990); Vick v. South Carolina Dep't of Transp., 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001) (parties agreed to jury trial in compensation phase); Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993); Gray v. South Carolina Dep't of Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1993); Newsome v. Town of Surfside Beach, 300 S.C. 14, 386 S.E.2d 274 (Ct. App. 1989).

issue whether a landowner is entitled to a jury trial as a matter of right. The constitutional right to a jury trial is found in article I, § 14, of the South Carolina Constitution which states that "the right of trial by jury shall be preserved inviolate." The right to a jury trial is protected under this provision only if such a right existed in 1868 when our constitution was adopted. State v. Gibbes, 109 S.C. 135, 95 S.E. 346 (1918); *see also* Unisys Corp. v. South Carolina Budget and Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) (no constitutional right to a jury trial in an action against the sovereign not recognized at time constitution was adopted). We have specifically held there is no constitutional right to a jury trial in an eminent domain case because there was no such right when our constitution was adopted. Gilmer v. Hunnicutt, 57 S.C. 166, 35 S.E. 521 (1900).

This constitutional analysis applies with equal force in the analogous context of an inverse condemnation action. In eminent domain proceedings, a governmental entity is the moving party seeking to take property in exchange for compensation. In inverse condemnation cases, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking entitling him to compensation. South Carolina State Hwy. Dep't v. Moody, 267 S.C. 130, 226 S.E.2d 423 (1976). These actions are treated alike under the takings clause of our State Constitution.[3] *E.g.*, Spradley v. South Carolina State Hwy. Dep't, 256 S.C. 431, 182 S.E.2d 735 (1971); South Carolina State Hwy. Dep't v. Moody, *supra*; King v. South Carolina State Hwy. Dep't, 248 S.C. 64, 149 S.E.2d 64 (1966); Milhous v. State Hwy. Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940); Chick Springs Water Co. v. State Hwy. Dep't, 159 S.C. 481, 157 S.E. 842 (1931). Because an eminent domain action and an inverse condemnation action are treated equally under our constitution, we hold there is no constitutional right to a jury trial in an inverse condemnation case just as no such right exists in an eminent domain case. Other courts have used this analysis to reach this same conclusion. *See* Cumberland Farms, Inc. v. Town of Groton, 808 A.2d

[3]Article I, § 17, provides that "private property shall not be taken . . . for public use without just compensation being first made therefor."

1107 (Conn. 2002); Dep't of Ag. and Consumer Servs. v. Bonnano, 568 So.2d 24 (Fla. 1990); *cf.* Housing Fin. and Dev. Corp. v. Ferguson, 979 P.2d 1107 (Hawai'i 1999) (right to jury trial existed in 1959 when state constitution was adopted).

Despite the fact there is no constitutional right to a jury in an eminent domain case, such a right is provided by statute. South Carolina Code Ann. § 28-2-310 (1991) provides in an eminent domain action a property owner or the condemnor may elect a jury trial on the issue of compensation. In light of the historical treatment of an inverse condemnation action as equivalent to an eminent domain case, we conclude this statutory right to a jury trial on the issue of compensation applies as well in inverse condemnation actions. *See* State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997) (General Assembly is presumed to be aware of the common law when enacting legislation); *accord* Brock v. State Hwy. Comm'n, 404 P.2d 934 (Kan. 1965) (in inverse condemnation action same rules apply as in condemnation proceeding). Accordingly, in an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request.[4]

CONCLUSION

Landowners are entitled to a jury trial in the compensation phase as provided in Judge Few's order. DOT therefore has not been deprived of a mode of trial to which it is entitled as a matter of right. Accordingly, we affirm the dismissal of DOT's appeal. DOT's contention that it is entitled to a bifurcated proceeding in order to allow it to "undo" its actions as an alternative to compensation is an issue that is not before us since there has been no ruling below. Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001) (issues not ruled upon in the trial court will not be considered on appeal).

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[4]The Court of Appeals recently approved such a bifurcated proceeding in an inverse condemnation action. Hardin v. South Carolina Dep't of Transp., 359 S.C. 244, 597 S.E.2d 814 (Ct. App. 2004).

AFFIRMED AS MODIFIED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Brenda Gail Cutro, Appellant.

Appeal from Richland County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26027
Heard May 3, 2005 - Filed August 15, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz and Assistant Appellate Defender Robert M. Dudek, both of S.C. Office of Appellate Defense; and Beattie I. Butler, of Charleston, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter; and Solicitor Warren B. Giese, all of Columbia, for respondent.

JUSTICE MOORE: Appellant was convicted of two counts of homicide by child abuse for the deaths of two infants in her home daycare. We affirm.

FACTS

Appellant and her husband Josh Cutro operated a home daycare in Irmo, South Carolina. Between January and September of 1993, two infants, Parker Colson and Ashlan Daniel, died at the Cutros' home. A third infant, Asher Maier, became ill while at their home and was subsequently diagnosed with serious brain damage. The State produced evidence that all three infants were victims of Shaken Baby Syndrome. Appellant was convicted of two counts of homicide by child abuse and sentenced to concurrent life sentences for killing Parker Colson and Ashlan Daniel; she was acquitted of the assault and battery charge regarding Asher Maier.

The State's theory of the case was that appellant's actions were motivated by Munchausen Syndrome by Proxy (MSBP), which the State's medical experts defined as a form of child abuse in which the perpetrator harms a child in order to garner sympathy and attention for herself.[1]

Parker Colson

Parker Colson was almost five months old when he was found dead in his crib at the Cutros' home on January 4, 1993. According to his parents, Parker was a healthy baby and had no health problems that morning. His mother dropped him off at the Cutros' daycare at about 7:30 a.m. At 1:57 p.m., emergency personnel received a call to the Cutros' home. When they arrived at 2:11 p.m., Parker was not breathing. He was rushed to the hospital where he was declared dead.

Parker's mother testified that appellant told her the following regarding Parker's death:

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[1] MSBP was first identified by a pediatrician in 1997 and is a medically recognized syndrome.

A: She told me that Parker was taking a nap. She went in and checked on him. He was asleep. She went in the kitchen, reached up in the cabinet to get his food down. Josh came in behind her and screamed, Parker's not breathing, call 9-1-1.

. . . .

Q: After she left the room where Parker was and went into the kitchen, how long a period of time did she indicate it was before Josh entered the room and screamed?

A: The way she explained it to me was she checked on Parker, walked in the kitchen, and reached in the cabinet. Josh walked in behind her and screamed, Parker's not breathing, call 9-1-1 – however long it takes to get from the living room into the kitchen and reach into a cabinet, a few seconds. And her kitchen was right beside the living room.

Q: So according to Gail Cutro, who was the last person who had contact with your son Parker before Josh Cutro found him not breathing?

A: Gail.

After an autopsy, the coroner's office reported Parker's cause of death as Sudden Infant Death Syndrome, or "SIDS," which is the diagnosis given when an infant's cause of death cannot be identified. Dr. Daniel, who performed the autopsy, did note the presence of petechial hemorrhages in the cortical section of Parker's brain which she testified was unusual in a SIDS case.

In July 1994, Parker's body was exhumed and re-autopsied. Dr. Ophoven, who reviewed the autopsy report, concluded that the presence of the petechial hemorrhages in Parker's brain and a sub-dural hematoma, which had not been discovered in the original autopsy, indicated Parker died a traumatic death caused by shaking and asphyxia. Dr. Gilbert-Barness testified that Parker died of Shaken Baby Syndrome which damaged the medulla causing the heart and respiration to stop.

Other medical testimony indicated that Shaken Baby Syndrome can occur with no external sign of trauma. Because a baby's brain is not fully developed, violent shaking damages the vital center of the brain that controls breathing which can cause death by asphyxiation. The presence of petechial hemorrhages indicates asphyxia. Expert testimony further indicated that the symptoms of Shaken Baby Syndrome manifest immediately after the shaking -- head injury occurs within seconds and a baby might die immediately.

Asher Maier

Asher Maier was four months old when he began daycare with the Cutros on June 7, 1993. A couple of days after beginning daycare, Asher became irritable and stopped sleeping through the night. He was fussy on June 23 when his mother dropped him off at the Cutros' at about 7:30 a.m. Between 10:30 and 10:50 a.m., Mrs. Maier received a telephone call at work from appellant stating that the baby was "inconsolable" and suggesting she pick him up and take him to the doctor. When Mrs. Maier arrived at the Cutros' a short time later, the baby was already in his car seat and they immediately handed him to her. Asher remained in his car seat until he was in the doctor's office. When Mrs. Maier removed him, she discovered Asher was limp and unable to control his neck. Another child's parent had seen Asher that morning in daycare and testified he was moving normally at that time.

Dr. Alexander, who reviewed Asher's medical records, testified in his opinion Asher had been the victim of two shaking episodes. An MRI and CT scan revealed old and new blood in his brain indicating an earlier episode, probably two weeks previous, that had healed to some extent. Asher also exhibited retinal hemorrhages indicative of Shaken Baby Syndrome.

Ashlan Daniel

Ashlan Daniel was about two months old when she began daycare with the Cutros in June 1993. Ashlan was in daycare for about only two hours a day while Mrs. Daniel worked part-time. On September 9, 1993, Mrs. Daniel dropped Ashlan off at the Cutros' at noon. A picture of Ashlan taken earlier

that day shows she was a healthy and normal baby, a description her parents corroborated.

When Mrs. Daniel left work at 2:30 p.m., she went to pick Ashlan up at the Cutros' home. She pulled up as EMS personnel were arriving. Josh Cutro came out of the house and told Mrs. Daniel that Ashlan was dead.

Ashlan's mother testified that appellant told her that she, appellant, found Ashlan not breathing and Josh was out of the house at that time. Another parent testified appellant told her Josh went to pick up their children from school and that she, appellant, was the only adult in the room when Ashlan stopped breathing.

Other parents of the Cutros' daycare children also testified. One parent testified Josh told her he had just returned home when appellant came outside to tell him about the baby. Another testified that appellant told her that she, appellant, "was in the room with Ashlan when she died. . . and that she couldn't believe that she didn't notice that [Ashlan] had stopped breathing."

Dr. Reynolds, who autopsied Ashlan's body, testified petechial hemorrhages were present in her brain, which he had never seen in a SIDS death. Because he could not determine the cause of death, he concluded it was SIDS.

Ashlan's body was exhumed and re-autopsied in July 1994. Dr. Ophoven testified that Ashlan's brain had a subdural hematoma which, in addition to the petechial hemorrhages, indicated she had died of trauma and asphyxia. Dr. Gilbert-Barness concurred and stated that these injuries indicated Shaken Baby Syndrome.

Evidence of MSBP

As proof of motive, the State introduced evidence of appellant's attention-seeking behavior regarding the purported SIDS deaths of the two infants who died in her daycare. She kept their obituaries, photos, and items of clothing, as well as frequently visiting their gravesites and emotionally discussing their deaths repeatedly with others. Appellant also fabricated that

she had lost one of her own children and that a baby had died in her care in 1992. The State's medical experts opined that the injuries to the three infants and appellant's behavior indicated a pattern of child abuse identified as MSBP.

ISSUES

1. Was appellant unfairly prejudiced by the trial court's refusal to sever the charges?

2. Was appellant unfairly prejudiced by evidence used to prove MSBP?

3. Were autopsy reports of other infants improperly admitted?

DISCUSSION

1. Joinder of charges

Appellant was first tried in 1994 and convicted of killing Ashlan Daniel. We reversed that conviction because evidence of the death and injury to the other two infants, Parker Colson and Asher Maier, was not clear and convincing and therefore was improperly admitted as Lyle[2] evidence. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998) (Cutro I).[3] Appellant contends the trial judge erred in denying her motion to sever the charges in this case based on our holding in Cutro I. For the reasons set forth below, we find our evidentiary ruling in Cutro I is not controlling here.

Generally, when offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind,

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[2] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

[3] Appellant was retried in 1999; that trial ended in a mistrial when the jury could not agree. This is appellant's third trial.

place, and character,[4] the trial judge has the discretion to order the indictments tried together, but only so long as the defendant's substantive rights are not prejudiced. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974); McCrary v. State, 249 S.C. 14, 152 S.E.2d 235 (1969). We have found prejudice where the defendant was jointly tried on charges for which the evidence would not otherwise have been admissible under Lyle. State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996). We now clarify that in determining joinder, the trial judge need not find clear and convincing evidence of the charges.

a. Distinction between evidentiary and joinder context

In the context of evidentiary law, Lyle and its progeny protect a defendant from the unrestricted admission of bad act evidence. Lyle prohibits such evidence unless the evidence has a particular relevance to the crime charged and falls within at least one of five categories: motive, identity, common scheme or plan, absence of mistake or accident, or intent.[5] Further, bad acts that are not the subject of conviction must be proved by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This preliminary fact-finding by the judge ensures the evidence is subjected to some procedural safeguard before the jury hears it.

In the context of the joinder of charges for a jury trial, however, procedural safeguards are already in place that eliminate the need for preliminary fact-finding by the trial judge. Before a defendant is tried on joint charges, the charges are investigated by law enforcement and subject to judicial procedures such as indictment and preliminary hearing. In this procedural context, it is unnecessary to hold a "mini-trial" for the State to

[4]Here, the State produced evidence each offense involved the violent shaking of an infant at the Cutro's home daycare with the intent of promoting sympathy for the caregiver from the resulting injury to the child. These offenses are closely related in kind, place, and character as required to support joinder.

[5]*See also* Rule 404(b), SCRE (codifying Lyle categories).

prove each charge to the judge before proceeding with a joint trial to the jury. *Accord* Solomon v. State, 646 A.2d 1064 (Md. App. 1995) (Moylan, J.).

Further, in the evidentiary context, bad act evidence that falls within a Lyle exception and meets the clear and convincing standard may still be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). Similarly, in the joinder context, the defendant may argue unfair prejudice if, after the State's case, the trial judge determines that a directed verdict should be granted. The standard for submission of charges to the jury is "any substantial evidence." State v. Johnson, 334 S.C. 78, 84, 512 S.E.2d 795, 798 (1999). If the trial judge finds there is no substantial evidence to submit any one of the joined charges to the jury, the defendant may move for a mistrial on the basis of unfair prejudice resulting from joinder.

b. Application of joinder standard

Here, according to the State's case, all three offenses are similar in kind, place, and character -- each involves Shaken Baby Syndrome inflicted on an infant in the Cutros' daycare. These offenses clearly fit within the Lyle categories for common scheme or plan and motive. We conclude the charges were properly tried jointly.

2. Evidence of MSBP

Appellant contends evidence concerning the memorabilia seized from her home regarding the two dead infants was unfairly prejudicial and improperly admitted at trial. The State introduced the babies' memorabilia as indicative of MSBP which is marked by attention-seeking behavior. The trial judge charged the jury that it was to consider the diagnosis and evidence of MSBP only for the limited purpose of establishing motive or absence of illness, mistake, or accident.

Appellant claims exclusion of this evidence is mandated under State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998), which held that "propensity evidence" is inadmissible. We find Nelson distinguishable. In that case, children's toys, videos, photographs of young girls, and other evidence

tending to depict the defendant as a pedophile were admitted at his trial for criminal sexual conduct and committing lewd acts on a minor. We held this evidence should have been excluded because character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." Nelson, 331 S.C. at 6, 501 S.E.2d at 719.

In this case, the evidence is not general propensity evidence but indicates appellant's behavior regarding the deaths of these two infants. Since the State's theory of the case was that appellant killed the victims to gain sympathy and attention for herself, this evidence is relevant to show motive. *See* State v. Hocevar, 7 P.3d 329 (Mont. 2000) (evidence of MSBP admissible on issue of motive). Further, in Nelson the evidence was admitted simply to depict the defendant as a pedophile. There was no expert testimony relating the contested evidence to the charges as in this case.

Finally, collecting memorabilia of a deceased child, while perhaps uncommon, is not behavior that itself indicates a bad character. In fact, appellant presented extensive evidence that her grief was a normal response to the deaths of these children. This evidence did not unfairly suggest that appellant had a propensity to commit crimes against children. *See* State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis). We conclude appellant was not unfairly prejudiced by the admission of this evidence.[6]

3. Autopsy reports of other SIDS deaths

The State's medical expert, Dr. Ophoven, testified she examined the autopsy reports of all SIDS deaths that occurred under one year of age in

[6]Appellant's brief mentions the funeral bulletin for the Lightfoot child, a baby who died of SIDS while in the care of another home daycare provider known to appellant through her church. This evidence also directly related to the case at hand. The State sought to establish that appellant knew about the outpouring of sympathy for the other daycare worker and this motivated her own behavior.

South Carolina since 1993. These 274 autopsy reports were marked as State's exhibits for identification during Dr. Ophoven's testimony along with a chart summarizing them. Dr. Ophoven testified that none of these autopsy reports noted petechial hemorrhages of the brain which are considered medical abnormalities that would ordinarily be documented in the course of an autopsy. She testified that the autopsies of Parker Colson and Ashlan Daniel were the only two in which such abnormalities were found, confirming her earlier observation that petechial hemorrhages do not occur in a SIDS death.

Appellant contends evidence concerning the autopsy reports of these other SIDS deaths was irrelevant, was inadmissible hearsay, and violated her confrontation rights.

Evidence is relevant if it tends to make the existence of any fact at issue more or less probable. State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (2004); Rule 404, SCRE. Here, medical testimony created an issue regarding the significance of petechial hemorrhages in determining the cause of death of the two infants. The fact that autopsies of SIDS deaths did not note this type of brain abnormality was relevant in distinguishing a SIDS case from a traumatic death.

Further, autopsy reports are not hearsay under Rule 803, SCRE. Subsection (8) of this rule excepts from hearsay public records and reports containing matters there is a duty to report. Autopsies are required in cases of SIDS if law enforcement deems it necessary. S.C. Code Ann. § 17-5-540 (2003) and § 20-7-5915 (Supp. 2004). Additionally, subsection (9) of Rule 803 specifically exempts from hearsay records of vital statistics, including "reports. . . of . . . deaths. . . if the report thereof was made to a public office pursuant to requirements of law." Autopsy reports are required to be kept by the medical examiner's office. S.C. Code Ann. § 17-5-280 (2003). Accordingly, an autopsy report is not inadmissible hearsay.

In addition, Rule 703, SCRE, specifically provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or

> made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

We conclude evidence of the autopsy reports was admissible under the Rules of Evidence.

Finally, in Crawford v. Washington, 541 U.S. 36, 54 (2004), the United States Supreme Court noted the hearsay exception for business records and observed that business records are not "testimonial" and therefore do not implicate the Confrontation Clause. A public record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights. Moreover, appellant was able to cross-examine Dr. Ophoven regarding the possible inaccuracies in these autopsy reports and presented extensive expert testimony reinterpreting the significance of their findings.[7] We find appellant's confrontation rights were not infringed.

We hold the trial judge did not err in allowing Dr. Ophoven's testimony regarding the autopsies of other deaths.

CONCLUSION

Appellant's remaining issues are without merit and are disposed of pursuant to Rule 220(b), SCACR, and the following authority: Issue 4: State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (for this Court to reverse based on erroneous exclusion of evidence, prejudice must be shown; error is harmless when it could not reasonably have affected result of the trial); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (any error in exclusion of cumulative evidence is harmless); Issue 5: State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) (if there is any substantial evidence tending to prove the guilt of the accused, or from which guilt may be fairly and logically deduced,

[7] Dr. Sexton, who performed several of these autopsies, testified that some showed microscopic brain vessel damage similar to that seen in Parker Colson and Ashlan Daniel.

the case should be submitted to the jury); State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004) (on appeal from denial of directed verdict, this Court must view the evidence in light most favorable to the State); Issue 6: State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963); State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct. App. 1986) (no error to refuse a charge on mere suspicion where the charge adequately instructs the jury regarding reasonable doubt); Issue 7: State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005) (involuntary manslaughter is not a lesser included offense of homicide by child abuse under the elements test); Issue 8: State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996) (if jury asks for further explanation of the law after indicating deadlock, the requirements of § 14-7-1330 are met).

AFFIRMED.

TOAL, C.J., WALLER and BURNETT, JJ., concur.
PLEICONES, J., dissents in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. As I understand appellant's joinder argument, she contends that the charges were improperly consolidated for trial. I agree, and would reverse on this ground.

The general rule is that the trial judge has discretion to order separate charges to be tried together over the defendant's objection where the offenses charged "are of the same general nature, involving connected transactions closely related in kind, place and character . . . ."[1] State v. Sullivan, 277 S.C. 35, 43, 282 S.E.2d 838, 843 (1981); cf., State v. Evans, 112 S.C. 43, 99 S.E. 751 (1919)(no abuse of discretion in trial judge's denial of defendants' motion to try two murder charges together). Once a court determines that charges may properly be joined, it must then consider whether it should decline to consolidate the claims in order to protect the defendant's right to a fair trial. Id. (joinder is improper where the defendant can demonstrate that his substantive rights would be violated by such a procedure); see also State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974); McCray v. State, 249 S.C. 14, 152 S.E.2d 235 (1967). As we have long recognized, "Circumstances might arise which would render a uniting of several counts unjust to the defendant." City of Greenville v. Chapman, 210 S.C. 157, 162, 41 S.E.2d 865, 867 (1947). Even where joinder is permissible, the trial court must be mindful of protecting the defendant's right to a fair trial because "[b]y the multiplication of distinct charges, the prisoner may be confounded in his defense, or prejudiced in his challenges, or the attention of the jury may be distracted." Id. (internal citations omitted).

In this case, the first issue is whether the trial judge abused his discretion in finding a relationship sufficient to permit the State to try appellant on three charges at a single trial: the homicide of Parker Colson on January 4, 1993; the injury to Asher Maier discovered on June 23, 1993; and the homicide of Ashlan Daniel on September 9, 1993. In my opinion, while these charges are of the same general nature, they do not involve "connected

[1] I disagree with the majority that the test for joinder is the same as the standard for admitting prior bad act evidence under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)/ Rule 404 (b), SCRE.

transactions closely related in kind, place and character" as these terms are defined by our case law. Crimes which do not arise out of a "single chain of circumstances" and which require "different evidence for proof" "clearly fail[] to meet the requirements for consolidation." State v. Middleton, 288 S.C. 21, 23, 339 S.E.2d 692, 693 (1986) (reversing where charges of rape and murder of one victim, rape and murder of a second victim the next day, and attempted robbery and assaults on the day after were consolidated for trial). I would hold the trial judge committed reversible error in allowing these three charges to be tried together over appellant's objection, as they did not arise out of a single chain of circumstances and required different proof.[2] Id.

I would reverse appellant's convictions and remand the matter for further proceedings.

[2] Even if I were to find these charges were sufficiently connected so as to be subject to consolidation, I would hold that joinder should have been denied in order to protect appellant's right to a fair trial. City of Greenville v. Chapman, *supra*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Lexington County Magistrate
Bruce Rutland, Respondent.

Opinion No. 26028
Submitted July 20, 2005 - Filed August 15, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Deborah S. McKeown, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Bruce Rutland, pro se, of Lexington, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition or public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] In

[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

addition, respondent agrees to neither seek nor accept any judicial position in South Carolina without prior consent of the Court.[2] The facts as set forth in the Agreement are as follows.

FACTS

On March 31, 2005, the Greenville County Sheriff's Office charged respondent with loitering to engage in criminal activity, a misdemeanor offense in violation of Greenville County Ordinance CO3686. Respondent was arrested and, thereafter, released on a $2,500 personal recognizance bond. On April 13, 2005, respondent was found guilty in his absence of the offense of loitering to engage in criminal activity.

On April 1, 2005, the day following his arrest, respondent retired from his position as a Lexington County Magistrate and presently holds no judicial position. Respondent served as a Lexington County magistrate from May 1981 until his retirement on April 1, 2005. Respondent has never been cautioned or sanctioned by the Commission on Judicial Conduct or this Court.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and Canon 4A(2) (judge shall conduct all extra-judicial activities so they do

[2] Respondent agrees to duly serve ODC with any petition seeking the Court's consent.

not demean the judicial office). By violating the Code of Judicial Conduct, respondent admits he has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Hereafter, respondent shall neither seek nor accept any judicial office in this state without prior consent of the Court, after due service on ODC of any petition seeking the Court's consent. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Steven J. Zimmerman & Sarah M. Zimmerman, Respondents,

v.

Vicki Lane Marsh, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Georgetown County
Benjamin H. Culbertson, Master-in-Equity

Opinion No. 26029
Heard May 17, 2005 - Filed August 15, 2005

REVERSED AND REMANDED

Robert H. Gwin, III, of Gwin Law Offices, LLC, of Myrtle Beach, for petitioner.

Robert H. O'Donnell, of O'Donnell Law Firm, LLC, of Georgetown, for respondents.

JUSTICE MOORE: This action arose when respondents (Zimmermans) sought the partition of a parcel of property they jointly owned

with petitioner (Marsh). The master-in-equity found partition by allotment was not feasible and ordered a judicial sale of the property. The Court of Appeals affirmed in an unpublished opinion. Zimmerman v. Marsh, Op. No. 2003-UP-662 (S.C. Ct. App. filed November 17, 2003). We reverse and remand.

FACTS

In 1991, Marsh and Walter Berg acquired a beach house, as co-tenants, for $110,000. During their ownership, the beach house was rented out during the summer season and occupied by Marsh for the remainder of the year. While living in the house, Marsh, a painter, created landscapes inspired by the surrounding Pawleys Island area. Despite attempts by Marsh to purchase Berg's interest in the property, the two remained co-tenants.

In 2002, the Zimmermans purchased Berg's one-half interest in the beach house for $160,000.[1] Thereafter, the deed and the instant partition action were filed minutes apart. Marsh responded by requesting partition by allotment, a result that would allow her to retain the beach house and pay the Zimmermans for their interest.

At trial, four appraisals were introduced in order to properly ascertain the value of the land. The Zimmermans introduced three appraisals of $320,000, $355,000, and $373,500. Marsh introduced one appraisal, which estimated the value of the parcel from $315,700 to $329,000. Marsh also introduced testimony to establish the duration of her ownership and the sentimental attachment she had for the property. At the conclusion of trial, the master ordered partition by public sale.

The master found that, due to the size, shape, and location of the

[1]The Zimmermans admit they made repeated inquiries into the availability of the house prior to their purchase and that they were aware Marsh was not interested in selling the beach house. We note respondent Sarah Zimmerman has been a real estate agent in the Pawleys Island area for several years.

property, a partition in kind was not possible. The master further found partition by allotment was not available due to the wide variance of the appraised values of the property. The master cited Pruitt v. Pruitt, 298 S.C. 411, 380 S.E.2d 862 (Ct. App. 1989), for the proposition that where two equally creditable yet significantly disparate appraisals are introduced, a court should not partition the property by allotment. The master noted Marsh's length of ownership and her emotional attachment to the property did not require that she be given priority over the Zimmermans. The Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err by finding partition by allotment inapplicable?

DISCUSSION

Marsh argues the Court of Appeals erred by finding partition by allotment inapplicable. She argues the Court of Appeals should be reversed and this matter remanded to the trial court for the purpose of allowing her to be allotted the property upon payment of the value of the Zimmermans' interest and for applying the appropriate set-off credits.

A partition action is an equitable action and, as such, we may review the evidence to determine facts in accordance with our own view of the preponderance of the evidence. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989).

The partition procedure must be fair and equitable to all parties of the action. Pruitt v. Pruitt, *supra*. When the court determines a partition cannot be fairly and equally made, the court may order a sale of the property and a division of the proceeds according to the rights of the parties. S.C. Code Ann. § 15-61-100 (2005). *See also* S.C. Code Ann. § 15-61-50 (2005) (if partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, then court of common pleas has jurisdiction to order sale of the property and the division of the proceeds

according to the parties' rights); Rule 71(f)(4), SCRCP ("If it shall appear to the court that it will be for the benefit of all parties interested in the . . . property that it should be vested in one or more of the persons entitled to a portion of it, on the payment of a sum of money . . ., the court shall determine accordingly, and the person or persons, on the payment of the consideration money, shall be vested with the [property]. But if it shall appear to the court that it would be more for the interest of the parties interested in the . . . property that it should be sold and the proceeds of sale be divided among them, then the court shall direct a sale to be made upon such terms as the court shall deem right."). Further, the party seeking a partition by sale carries the burden of proof to show that partition by allotment is not practicable or expedient. *See* Cox v. Frierson, 316 S.C. 469, 451 S.E.2d 392 (1994) (partition by allotment is statutorily preferred over judicial sale of the property). *Cf.* Anderson v. Anderson, *supra* (party seeking partition by sale carries burden to show partition *in kind* is not practicable or expedient). A partition by public sale, where there is disparate testimony as to the value of the property, will be required if equity necessitates such an outcome. *See* Pruitt v. Pruitt, *supra* (under particular facts and circumstances of Pruitt case, equity required judicial sale).

The master erred by finding a partition by allotment cannot be fairly made. While there were conflicting appraisals as to the value of the property, the value of the property could have been determined by the master. By taking into consideration the fact the Zimmermans paid Berg $160,000 for a one-half interest in the property and by taking an average of all of the appraisals, a value of the property can be obtained. We find that the pecuniary interests of the parties will not be damaged by averaging the appraisals. Further, we find it troublesome that the Zimmermans purchased their interest with the knowledge that Marsh would be unwilling to sell the property and with the apparent intention to seek an immediate partition of the property. Under the particular facts of this case, we find that equity does not necessitate a partition by public sale and a partition by allotment is the most equitable result.[2] *See* Pruitt v. Pruitt, *supra*.

[2]Contrary to the dissent's assertion, a public sale is not the only method of partition available in this case. Pursuant to § 15-61-50 and Rule 71(f)(4),

While we find that equitable considerations such as the length of ownership and sentimental attachment to the property may be considered, the pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or allow a partition by allotment. *See, e.g.*, Ark Land Co. v. Harper, 599 S.E.2d 754 (W.Va. 2004) (economic value of property is not the exclusive test for deciding whether to partition in kind or by sale; evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale); Schnell v. Schnell, 346 N.W.2d 713 (N.D. 1984) (sentimental reasons, particularly in preservation of a home, may be considered, although they are subordinate to the parties' pecuniary interests); Fike v. Sharer, 571 P.2d 1252 (Ore. 1977) (same); Pioneer Mill Co., Ltd. v. Ward, 37 Haw. 74, 1945 WL 5584 (Hawai'i Terr. 1945) (same); Anderson v. Anderson, 108 S.E. 907 (Ga. App. 1921) (same).

CONCLUSION

Under the particular facts of this case, we find the master erred by finding a judicial sale was appropriate. Because a value could have been placed on the property at the time of trial, Marsh's request for a partition by

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the appropriate and applicable remedy is a partition by allotment whereby one joint owner is allotted the entire property.

The dissent further contends partition by allotment is not applicable because a writ of partition, which commands nominated commissioners to partition the property, has not been issued. However, both § 15-61-100 and Rule 71(f)(5) allow the master to dispense with the issuing of a writ of partition if it would involve unnecessary expense. There is no statement in the rule or statutes which indicates that a writ of partition and a return from the commissioners is required before partition by allotment to one party can occur. To hold otherwise would expand the operation of the statutes and the rule. Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996) (in interpreting statute, words must be given plain and ordinary meaning without resorting to subtle or forced construction to limit or expand statute's operation).

allotment should have been granted. We remand to the master to set the value of the property, adjusted by appropriate set-off credits, so that Marsh may purchase the Zimmermans' one-half interest. Accordingly, the decision of the Court of Appeals is

REVERSED AND REMANDED

TOAL, C.J., and WALLER, J., concur. PLEICONES, J., dissenting in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. While the Zimmermans' conduct may properly be characterized as acquisitive, they have done nothing illegal.

A joint tenant may compel partition. S.C. Code Ann. § 15-61-10 (2005). A court may order partition in kind, that is, divide the property among all the owners, or by allotment, that is, to "allot" a portion of the property to one of the owners, with the remainder held jointly by the other owners or sold with the proceeds divided among the owners,[1] or by judicial sale of the entire parcel. S.C. Code Ann. § 15-61-50 (2005). The circuit court may, in some limited circumstances not present here, allot the property to one of the joint owners and require that individual to pay a sum assessed by partition commissioners to the other owner(s). Rule 71(f), SCRCP2; Carnes v. White, 3 S.C.L.(1 Brev.) 458 (1889)(partition commissioners may make special return: upon payment of sum set by them title vests in payor).

In this case, there is no contention that a partition in kind can be made, there being one house located on one lot. Further, the property is not capable of partition by allotment between the parties**.** The majority in effect orders a private rather than a public sale: this is not a form of partition recognized in this jurisdiction absent a special return by five commissioners acting upon a writ of partition.[3] § 15-61-50; compare Fike v. Sharer, 571 P.2d 1252 (Ore. 1977) (Oregon statute permits partition by private sale between the parties

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[1] See, e.g., Few v. Few, 242 S.C. 433, 131 S.E.2d 208 (1963); Bennett v. Floyd, 237 S.C. 64, 115 S.E.2d 659 (1960).

[2] The majority characterizes its relief as a partition by allotment pursuant to Rule 71(f)(4), SCRCP. I have reviewed the record and have found neither a writ of partition nor a return from the commissioners. Absent compliance with the requirements of this rule, a court may order only a partition in kind or a public sale. S.C. Code Ann. § 15-61-100(2005); Rule 71(f)(5), SCRCP.

[3] I note further that a party not allotted the property by the commissioners may force a public sale by "making and securing a bid for a material advance in price over the value assessed by the Commissioners." Moore v. Williamson, 31 S.C. Eq.(10 Rich. Eq.) 323 (1858).

where neither partition in kind nor by public sale can be achieved without great prejudice to the owners).

I am not averse to permitting consideration of sentimental attachment in a partition suit, but I would limit its use as have other jurisdictions; sentimental value may tip the balance in favor of a partition in kind rather than by public sale even where a sale would generate a somewhat more favorable financial outcome for the parties. See Ark Land Co. v. Harper, 599 S.E.2d 754 (W.Va. 2004) (where commercial entity becomes co-owner with expectation it can make money off the land from its business venture, court will not permit this self-created value enhancement to be determinative factor in forcing sale; partition in kind ordered even though business suffered some "economic inconvenience"); Schnell v. Schnell, 346 N.W.2d 713 (N.D. 1984)(partition in kind rather than sale ordered where divorced parties were dividing a sizable ranch); Pioneer Mill Co., Ltd. v. Ward, 37 Haw. 74 (Hawai'i Terr. 1945) (partition in kind even though topography made it difficult; sentimentality rule recited but not applied); Anderson v. Anderson, 108 S.E. 907 (Ga. App. 1921) (sentimentality weighs in favor of in kind partition but pecuniary factors are determinative in deciding between in kind partition and judicial sale).

No one contends that an in kind distribution or allotment is feasible here, and thus we do not reach the issue of the weight to be given Ms. Marsh's emotional ties to the property in deciding the mode of partition to be employed. A public sale is the only method of partition available, and the Zimmermans are within their legal rights in demanding one be held. § 15-61-10. I would not alter the law of partition to favor a joint owner perceived as more worthy, and therefore would affirm the decision of the Court of Appeals which itself affirmed the master's order.

BURNETT, J., concurs

The Supreme Court of South Carolina

In the Matter of John A. Pincelli, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that John A. Sowards, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Sowards shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Sowards may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that John A. Sowards, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that John A. Sowards, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Sowards' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

August 10, 2005